



February 3, 2009

SENATE BILL No. 353

DIGEST OF SB 353 (Updated January 29, 2009 1:33 pm - DI 106)

Citations Affected: IC 5-11; IC 34-25.

Synopsis: Recovery of public money. Authorizes an examiner to file a report with the state examiner and the attorney general promptly disclosing certain instances of nonfeasance, misfeasance, or malfeasance in the performance of an official duty by a state officer or employee or the letting or performance of a public contract. Permits the attorney general and other persons acting on behalf of the state, a municipal corporation, a political subdivision, or a school corporation to institute attachment proceedings under certain circumstances. Makes other changes and conforming amendments.

Effective: July 1, 2009.

Bray

January 8, 2009, read first time and referred to Committee on Judiciary.
February 2, 2009, amended, reported favorably — Do Pass.

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SB 353—LS 6877/DI 87+



February 3, 2009

First Regular Session 116th General Assembly (2009)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2008 Regular Session of the General Assembly.

SENATE BILL No. 353

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 5-11-5-1 IS AMENDED TO READ AS FOLLOWS
2 [EFFECTIVE JULY 1, 2009]: Sec. 1. (a) Whenever an examination is
3 made under this article, a report of the examination shall be made. The
4 report must include a list of findings and shall be signed and verified
5 by the examiner making the examination. A finding that is critical of
6 an examined entity must be based upon one (1) of the following:

7 (1) Failure of the entity to observe a uniform compliance
8 guideline established under IC 5-11-1-24(a).

9 (2) Failure of the entity to comply with a specific law.

10 A report that includes a finding that is critical of an examined entity
11 must designate the uniform compliance guideline or the specific law
12 upon which the finding is based. The reports shall immediately be filed
13 with the state examiner, and, after inspection of the report, the state
14 examiner shall immediately file one (1) copy with the officer or person
15 examined, one (1) copy with the auditing department of the
16 municipality examined and reported upon, and one (1) copy in an
17 electronic format under IC 5-14-6 of the reports of examination of state

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1 agencies, instrumentalities of the state, and federal funds administered
 2 by the state with the legislative services agency, as staff to the general
 3 assembly. Upon filing, the report becomes a part of the public records
 4 of the office of the state examiner, of the office or the person examined,
 5 of the auditing department of the municipality examined and reported
 6 upon, and of the legislative services agency, as staff to the general
 7 assembly. A report is open to public inspection at all reasonable times
 8 after it is filed. If an examination discloses malfeasance, misfeasance,
 9 or nonfeasance in office or of any officer or employee, a copy of the
 10 report, signed and verified, shall be placed by the state examiner with
 11 the attorney general. The attorney general shall diligently institute and
 12 prosecute civil proceedings against the delinquent officer, or upon the
 13 officer's official bond, or both, and against any other proper person that
 14 will secure to the state or to the proper municipality the recovery of any
 15 funds misappropriated, diverted, or unaccounted for.

16 (b) Before an examination report is signed, verified, and filed as
 17 required by subsection (a), the officer or the chief executive officer of
 18 the state office, municipality, or entity examined must have an
 19 opportunity to review the report and to file with the state examiner a
 20 written response to that report. If a written response is filed, it becomes
 21 a part of the examination report that is signed, verified, and filed as
 22 required by subsection (a).

23 (c) Except as required by subsection (b) **and subsection (d)**, it is
 24 unlawful for any deputy examiner, field examiner, or private examiner,
 25 before an examination report is made public as provided by this
 26 section, to make any disclosure of the result of any examination of any
 27 public account, except to the state examiner or if directed to give
 28 publicity to the examination report by the state examiner or by any
 29 court. If an examination report shows or discloses the commission of
 30 a crime by any person, it is the duty of the state examiner to transmit
 31 and present the examination report to the grand jury of the county in
 32 which the crime was committed at its first session after the making of
 33 the examination report and at any subsequent sessions that may be
 34 required. The state examiner shall furnish to the grand jury all evidence
 35 at the state examiner's command necessary in the investigation and
 36 prosecution of the crime.

37 (d) **If, during an examination under this article, a deputy**
 38 **examiner, field examiner, or private examiner acting as an agent**
 39 **of the state examiner determines that all of the following conditions**
 40 **are satisfied, the deputy examiner shall report the determination**
 41 **to the state examiner:**

42 (1) **A substantial amount of public funds have been**

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misappropriated, diverted, or are unaccounted for.

(2) There is a reasonable likelihood that the final report under subsection (a) will include a finding that the entity failed to observe a uniform compliance guideline established under IC 5-11-1-24(a) or a finding that the entity failed to comply with specific law.

(3) The malfeasance, misfeasance, or nonfeasance that resulted in the misappropriation, diversion, or inability to account for the public funds was committed by the officer or employee who is primarily responsible for ensuring compliance with laws regarding maintaining and accounting for the funds.

(e) After receiving a preliminary report under subsection (d), the state examiner shall provide a copy of the report to the attorney general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer or employee, or upon the officer's or employee's official bond, or both, and against any other proper person, that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.

(f) In an action under subsection (e), the attorney general may attach the defendant's property pursuant to IC 34-25-2.

(g) A preliminary report issued under subsection (d) is not a part of the public records of the state examiner until the final report under subsection (a) is issued, unless the attorney general institutes an action under subsection (e) on the basis of the preliminary report.

SECTION 2. IC 5-11-6-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 1. (a) The state examiner, personally or through the deputy examiners, field examiners, or private examiners, upon the petition of twenty-five (25) interested taxpayers showing that effective local relief has not and cannot be obtained after due effort, shall make the inquiries, tests, examinations, and investigations that may be necessary to determine whether:

(1) any public contract has been regularly and lawfully executed and performed; or

(2) any public work, building, or structure has been or is being performed, built, or constructed in accordance with the terms and provisions of the contract, and in compliance with the plans and specifications, if any.

Upon a written petition of twenty-five (25) taxpayers the state examiner may also require all plans, specifications, and estimates to be submitted

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to the state examiner for corrections and approval before a contract is awarded.

(b) The state examiner, deputy examiner, and any field examiner, when engaged in making an inquiry, test, examination, or investigation under subsection (a), is entitled to examine and inspect any public records, documents, data, contracts, plans, and specifications contained or found in any public office or other place pertaining or relating to the public contract or public work, building, or structure. In addition, subpoenas may be issued to witnesses to appear before the examiner in person or to produce books and papers for inspection and examination. The state examiner, deputy, field, and private examiner may administer oaths and examine witnesses under oath either orally or by interrogatories on all matters under examination and investigation. Under order of the state examiner, the examination may be transcribed, with the reasonable expense paid by the municipality in the same manner as the compensation of the field examiner is paid.

(c) The state examiner, the deputy examiner, and a field examiner may enforce attendance and answers to questions and interrogatories, as provided by law, with respect to examinations and investigations made by the state examiner, deputy examiner, field examiner, or private examiner of public offices.

(d) The state examiner, deputy examiner, any field examiner, and any private examiner, when making an examination or investigation under subsection (a), shall examine, inspect, and test the public works, buildings, or structures in the manner that the examiner sees fit to determine whether it is being performed, built, or constructed according to the contract and plans and specifications.

(e) The state examiner shall file a report covering any examination or investigation that discloses:

(1) fraud, collusion, misconduct, or negligence in the letting or the execution of any public contract or in the performance of any of the terms and conditions of any public contract; or

(2) any failure to comply with the terms or conditions of any public contract in the construction of any public work, building, or structure or to perform, build, or construct it according to the plans and specifications, if any, provided in the contract;

that causes loss, injury, waste, or damage to the state, the municipality, taxing or assessment district, other public entity, or to its citizens, if it is enforceable by assessment or taxation.

(f) The report must ~~be~~ **meet the following requirements:**

(1) **The report must be** made, signed, and verified in quadruplicate by the examiner making the examination. ~~and~~

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(2) **The report may be filed promptly with the state examiner at the time the matter is discovered and before the audit is concluded subject to subsection (j).**

After inspection of the report, the state examiner shall file a copy of the report **promptly** with the attorney general.

(g) The attorney general shall diligently institute and prosecute civil proceedings against any or all officers, individuals, and persons in the form and manner that the attorney general determines will secure a proper recovery to the state, municipality, taxing or assessment district, or other public entity injured, defrauded, or damaged by the matters in the report. These prosecutions may be made by the attorney general and the recovery may be had, either upon public official bonds, contractors' bonds, surety or other bonds, or upon individual liability, either upon contract or in tort, as the attorney general determines is wise. No action or recovery in any form or manner, or against any party or parties, precludes further or additional action or recovery in any other form or manner or against another party, either concurrently with or later found necessary, to secure complete recovery and restitution with respect to all matters exhibited, set out, or described in the report. The suits may be brought in the name of the state on the relation of the attorney general for the benefit of the state, or the municipality, taxing or assessment district, or other public entity that may be proper. The actions brought against any defendants may be joined, as to parties, form, and causes of action, in the manner that the attorney general decides.

(h) Any report described in this section or a copy duly certified by the state examiner shall be taken and received in any and all courts of this state as prima facie evidence of the facts stated and contained in the reports.

(i) If an examination, investigation, or test is made without a petition being first filed and the examination, investigation, or test shows that the terms of the contract are being complied with, then the expense of the examination, investigation, or test shall be paid by the state upon vouchers approved by the state examiner from funds available for contractual service of the state board of accounts. If such a report shows misfeasance, malfeasance, or nonfeasance in public office or shows that the terms of the plans and specifications under which a contract has been awarded are not being complied with, it is unlawful to make the report public until the report has been certified to the attorney general.

(j) If, during an examination under this article, a deputy examiner, field examiner, or private examiner acting as an agent

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of the state examiner determines that all of the following conditions are satisfied, the examiner shall report the determination to the state examiner:

(1) A substantial amount of public funds has been misappropriated or diverted or is unaccounted for.

(2) There is a reasonable likelihood that the final report under subsection (e) or (f) will include a finding that a public contract has not been regularly and lawfully executed and performed or that a public work, building, or structure has not been or is not being performed, built, or constructed in accordance with the terms and provisions of the contract, and in compliance with the plans and specifications, if any.

(3) The malfeasance, misfeasance, or nonfeasance that resulted in the misappropriation of, diversion of, or inability to account for the public funds was committed by the officer or employee who is primarily responsible for ensuring compliance with the terms of the public contract and laws regarding maintaining and accounting for the funds received in connection with a public contract.

(k) After receiving a preliminary report under subsection (j), the state examiner shall provide a copy of the report to the attorney general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer or employee, or upon the officer's or employee's official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.

(l) In an action under subsection (k), the attorney general may attach the defendant's property pursuant to IC 34-25-2.

(m) A preliminary report under subsection (j) is not a part of the public records of the state examiner until the final report under subsection (e) is issued, unless the attorney general institutes an action under subsection (k) on the basis of the preliminary report.

SECTION 3. IC 34-25-2-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 1. (a) At or after the time of filing a complaint, the plaintiff may have an attachment against the property of the defendant, in the cases described in subsection (b) and in the manner described in this chapter.

(b) The plaintiff may attach property when the action is for the recovery of money and the defendant:

(1) is, or one (1) of several defendants is, a foreign corporation or a nonresident of Indiana;

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(2) is, or one (1) of several defendants is, secretly leaving or has left Indiana with intent to defraud:

(A) the defendant's creditors;

(B) the state;

(C) a municipal corporation;

(D) a political subdivision; or

(E) a school corporation (as defined in IC 20-18-2-16(c));

(3) is concealed so that a summons cannot be served upon the defendant;

(4) is removing or about to remove the defendant's property subject to execution, or a material part of the property, outside Indiana, not leaving enough behind to satisfy the plaintiff's claim;

(5) has sold, conveyed, or otherwise disposed of the defendant's property subject to execution, or permitted the property to be sold with the fraudulent intent to cheat, hinder, or delay:

(A) the defendant's creditors;

(B) the state;

(C) a municipal corporation;

(D) a political subdivision; or

(E) a school corporation (as defined in IC 20-18-2-16(c));

or

(6) is about to sell, convey, or otherwise dispose of the defendant's property subject to execution with the fraudulent intent to cheat, hinder, or delay:

(A) the defendant's creditors;

(B) the state;

(C) a municipal corporation;

(D) a political subdivision; or

(E) a school corporation (as defined in IC 20-18-2-16(c)).

(c) The plaintiff is entitled to an attachment for the causes mentioned in subsection (b)(2), (b)(4), (b)(5), and (b)(6) whether the cause of action is due or not.

SECTION 4. IC 34-25-2-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 5. **Except for actions filed by the attorney general under IC 5-11-5-1 or IC 5-11-6-1**, the plaintiff or a person representing the plaintiff shall execute a written undertaking, with sufficient surety, to be approved by the clerk, payable to the defendant, to the effect that the plaintiff will:

(1) duly prosecute the proceeding in attachment; and

(2) pay all damages that may be sustained by the defendant if the proceedings of the plaintiff are wrongful and oppressive.

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COMMITTEE REPORT

Madam President: The Senate Committee on Judiciary, to which was referred Senate Bill No. 353, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 5-11-5-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 1. (a) Whenever an examination is made under this article, a report of the examination shall be made. The report must include a list of findings and shall be signed and verified by the examiner making the examination. A finding that is critical of an examined entity must be based upon one (1) of the following:

- (1) Failure of the entity to observe a uniform compliance guideline established under IC 5-11-1-24(a).
- (2) Failure of the entity to comply with a specific law.

A report that includes a finding that is critical of an examined entity must designate the uniform compliance guideline or the specific law upon which the finding is based. The reports shall immediately be filed with the state examiner, and, after inspection of the report, the state examiner shall immediately file one (1) copy with the officer or person examined, one (1) copy with the auditing department of the municipality examined and reported upon, and one (1) copy in an electronic format under IC 5-14-6 of the reports of examination of state agencies, instrumentalities of the state, and federal funds administered by the state with the legislative services agency, as staff to the general assembly. Upon filing, the report becomes a part of the public records of the office of the state examiner, of the office or the person examined, of the auditing department of the municipality examined and reported upon, and of the legislative services agency, as staff to the general assembly. A report is open to public inspection at all reasonable times after it is filed. If an examination discloses malfeasance, misfeasance, or nonfeasance in office or of any officer or employee, a copy of the report, signed and verified, shall be placed by the state examiner with the attorney general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer, or upon the officer's official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.

(b) Before an examination report is signed, verified, and filed as required by subsection (a), the officer or the chief executive officer of

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the state office, municipality, or entity examined must have an opportunity to review the report and to file with the state examiner a written response to that report. If a written response is filed, it becomes a part of the examination report that is signed, verified, and filed as required by subsection (a).

(c) Except as required by subsection (b) **and subsection (d)**, it is unlawful for any deputy examiner, field examiner, or private examiner, before an examination report is made public as provided by this section, to make any disclosure of the result of any examination of any public account, except to the state examiner or if directed to give publicity to the examination report by the state examiner or by any court. If an examination report shows or discloses the commission of a crime by any person, it is the duty of the state examiner to transmit and present the examination report to the grand jury of the county in which the crime was committed at its first session after the making of the examination report and at any subsequent sessions that may be required. The state examiner shall furnish to the grand jury all evidence at the state examiner's command necessary in the investigation and prosecution of the crime.

(d) If, during an examination under this article, a deputy examiner, field examiner, or private examiner acting as an agent of the state examiner determines that all of the following conditions are satisfied, the deputy examiner shall report the determination to the state examiner:

- (1) A substantial amount of public funds have been misappropriated, diverted, or are unaccounted for.**
- (2) There is a reasonable likelihood that the final report under subsection (a) will include a finding that the entity failed to observe a uniform compliance guideline established under IC 5-11-1-24(a) or a finding that the entity failed to comply with specific law.**
- (3) The malfeasance, misfeasance, or nonfeasance that resulted in the misappropriation, diversion, or inability to account for the public funds was committed by the officer or employee who is primarily responsible for ensuring compliance with laws regarding maintaining and accounting for the funds.**

(e) After receiving a preliminary report under subsection (d), the state examiner shall provide a copy of the report to the attorney general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer or employee, or upon the officer's or employee's official bond, or both,

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and against any other proper person, that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.

(f) In an action under subsection (e), the attorney general may attach the defendant's property pursuant to IC 34-25-2.

(g) A preliminary report issued under subsection (d) is not a part of the public records of the state examiner until the final report under subsection (a) is issued, unless the attorney general institutes an action under subsection (e) on the basis of the preliminary report."

Page 2, line 41, delete "must" and insert "may".

Page 3, line 1, after "concluded", insert "subject to subsection (j)".

Page 3, after line 38, begin a new paragraph and insert:

"(j) If, during an examination under this article, a deputy examiner, field examiner, or private examiner acting as an agent of the state examiner determines that all of the following conditions are satisfied, the examiner shall report the determination to the state examiner:

(1) A substantial amount of public funds has been misappropriated or diverted or is unaccounted for.

(2) There is a reasonable likelihood that the final report under subsection (e) or (f) will include a finding that a public contract has not been regularly and lawfully executed and performed or that a public work, building, or structure has not been or is not being performed, built, or constructed in accordance with the terms and provisions of the contract, and in compliance with the plans and specifications, if any.

(3) The malfeasance, misfeasance, or nonfeasance that resulted in the misappropriation of, diversion of, or inability to account for the public funds was committed by the officer or employee who is primarily responsible for ensuring compliance with the terms of the public contract and laws regarding maintaining and accounting for the funds received in connection with a public contract.

(k) After receiving a preliminary report under subsection (j), the state examiner shall provide a copy of the report to the attorney general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer or employee, or upon the officer's or employee's official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.

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(l) In an action under subsection (k), the attorney general may attach the defendant's property pursuant to IC 34-25-2.

(m) A preliminary report under subsection (j) is not a part of the public records of the state examiner until the final report under subsection (e) is issued, unless the attorney general institutes an action under subsection (k) on the basis of the preliminary report.

SECTION 3. IC 34-25-2-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 1. (a) At or after the time of filing a complaint, the plaintiff may have an attachment against the property of the defendant, in the cases described in subsection (b) and in the manner described in this chapter.

(b) The plaintiff may attach property when the action is for the recovery of money and the defendant:

(1) is, or one (1) of several defendants is, a foreign corporation or a nonresident of Indiana;

(2) is, or one (1) of several defendants is, secretly leaving or has left Indiana with intent to defraud:

(A) the defendant's creditors;

(B) the state;

(C) a municipal corporation;

(D) a political subdivision; or

(E) a school corporation (as defined in IC 20-18-2-16(c));

(3) is concealed so that a summons cannot be served upon the defendant;

(4) is removing or about to remove the defendant's property subject to execution, or a material part of the property, outside Indiana, not leaving enough behind to satisfy the plaintiff's claim;

(5) has sold, conveyed, or otherwise disposed of the defendant's property subject to execution, or permitted the property to be sold with the fraudulent intent to cheat, hinder, or delay:

(A) the defendant's creditors;

(B) the state;

(C) a municipal corporation;

(D) a political subdivision; or

(E) a school corporation (as defined in IC 20-18-2-16(c));

or

(6) is about to sell, convey, or otherwise dispose of the defendant's property subject to execution with the fraudulent intent to cheat, hinder, or delay:

(A) the defendant's creditors;

(B) the state;

(C) a municipal corporation;

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(D) a political subdivision; or

(E) a school corporation (as defined in IC 20-18-2-16(c)).

(c) The plaintiff is entitled to an attachment for the causes mentioned in subsection (b)(2), (b)(4), (b)(5), and (b)(6) whether the cause of action is due or not.

SECTION 4. IC 34-25-2-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 5. **Except for actions filed by the attorney general under IC 5-11-5-1 or IC 5-11-6-1**, the plaintiff or a person representing the plaintiff shall execute a written undertaking, with sufficient surety, to be approved by the clerk, payable to the defendant, to the effect that the plaintiff will:

- (1) duly prosecute the proceeding in attachment; and
- (2) pay all damages that may be sustained by the defendant if the proceedings of the plaintiff are wrongful and oppressive."

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to SB 353 as introduced.)

BRAY, Chairperson

Committee Vote: Yeas 5, Nays 1.

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